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fare equally throughout the country, and possibly lead to more efficient administration.[39]

Although Justice Harlan in *Shapiro* labeled the majority's holding an unwise extension of the equal protection clause,[40] it seems that if this trend toward expansion continues, state classifications that deny a right or privilege to one portion of its citizenry will be subject to closer scrutiny than in the past. There is no indication what classification the Court will next regard as "inherently suspect."

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Torts—Extrinsic-Fact Test in the Law of Slander

The law of defamation has provoked many caustic comments from legal writers. Sir Frederick Pollock notes that "no branch of the law has been more fertile of litigation than this [defamation] . . . nor has any been more perplexed with minute and barren distinctions."[1] Dean Prosser calls defamation "a senseless thing, for which no court and no writer has had a kind word for upwards of a century and a half. It has been denounced many times in whatever scathing terms the vivid imagination of learned and literary authors could invent . . . ."[2]

The confusion that tends to invade this area of the law is apparent in a recent North Carolina Court of Appeals case, *Beane v. Weiman Co.*[3] In an action for slander by a former employee against her former employer, her former employer's president, and two other company employees, the plaintiff alleged that a company official had been informed by the two other employees that plaintiff had called their wives and reported that they were consorting with other women. The official told plaintiff that one of the other employees was essential to the company and that he had no choice but to terminate plaintiff's employment. Plaintiff further alleged that these words were spoken by the employee-defendants with

[39] One suggested approach calls for the use of a negative income tax. See Tobin, Pechman, & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967).

[40] 394 U.S. at 659 (dissenting opinion).

[1] F. POLLOCK, THE LAW OF TORTS 237 (12th ed. 1923).

[2] Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960). In a lighter vein A. P. Herbert noted that "the law of libel is almost incomprehensible, except to those who have studied it from their cradles, and even for them it is a labyrinth of uncertainties, of false clues, blind alleys, and unexplored passages." A. P. HERBERT, UNCOMMON LAW 129 (1936).

[3] 5 N.C. App. 276, 168 S.E.2d 236 (1969).

malice and for the purpose of harming plaintiff's reputation and employment, that they had been repeated with malice by the company official within the scope of his employment, and that the words had caused injury to the plaintiff in her occupation. A demurrer to the complaint was sustained by the lower court and the North Carolina Court of Appeals affirmed.[4]

The separate actions for slander and libel have their roots deep in the common law. An early jurisdictional clash with the ecclesiastical courts resulted in the development of certain categories of words where pecuniary loss would be presumed and the common law courts would have jurisdiction.[5] Three categories of slander developed within which the plaintiff could recover without proof of damage: (1) words imputing a crime involving moral turpitude; (2) words imputing a loathesome disease; and (3) words affecting the plaintiff in his business, trade, profession, or office. In all other cases the plaintiff could not get his case to the jury without alleging and proving his pecuniary loss.[6] Incontinency of an innocent woman has been added by statute as a fourth category in most jurisdictions.[7] The courts referred to words falling within the categories as slander per se and those not within the categories as slander per quod.[8]

At common law the utterance could be within the categories by its apparent meaning or only by reason of extrinsic circumstances. The plaintiff was allowed to plead and prove facts not apparent upon the face of the publication by way of "inducement." He could then establish the defamatory sense of the publication with reference to such facts by "innuendo."[9] Such an innuendo was required whenever the plaintiff relied on extrinsic facts to give the words a defamatory meaning. In such a case the plaintiff was required to plead the words, the extrinsic facts, and knowledge of those facts by one or more of those persons to whom the words were published.[10] If by this method the plaintiff could estab-

[4] *Id.* at 276-77, 168 S.E.2d at 236-37.

[5] W. PROSSER, LAW OF TORTS 772 (3d ed. 1964) [hereinafter cited as PROSSER]; Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 110-12; Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 555-60 (1903).

[6] GATLEY ON LIBEL AND SLANDER 143 (6th ed. R. McEwen & P. Lewis 1967) [hereinafter cited as GATLEY]; M. NEWELL, SLANDER AND LIBEL 6-7 (4th ed. 1924) [hereinafter cited as NEWELL]; PROSSER 772-80.

[7] *E.g.*, N.C. GEN. STAT. § 99-4 (1965).

[8] Henn, *Libel-by-Extrinsic-Fact*, 47 CORNELL L.Q. 14, 17-18 (1961).

[9] GATLEY, *supra* note 6, at 94-95; PROSSER, *supra* note 5, at 766.

[10] GATLEY, *supra* note 6, at 94.

lish that the words were within any of the categories, the words were held to be slander per se without the requirement for allegation of special damages.

The law of libel, however, developed along different lines. The potential threat of the written word was recognized early by the English monarchy, and this realization led to the exercise of jurisdiction by the Star Chamber in certain cases of written defamation. The special categories that emerged in slander did not develop in libel since the early emphasis was not on limiting the action but on expanding it as part of a general censorship program.[11] Recovery is still allowed in England and in a minority of the American jurisdictions for all libel with no requirement that plaintiff plead and prove damages.[12] However, the majority of American jurisdictions have deviated from the common law rule.[13] The majority allow recovery without proof of special damages only in those cases in which the defamatory nature of the writing is apparent on its face or in which the plaintiff can show, by resorting to extrinsic facts, that the writing falls within the four special slander categories. In all other cases in which only extrinsic facts show defamation, the plaintiff must plead and prove special damages.[14]

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[11] Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 116-22; Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 562-71 (1903).

[12] Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 843 (1960). The *Restatement of Torts* states that "[O]ne who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom." RESTATEMENT OF TORTS § 3-569 (1938).

[13] *See*, Henn, *Libel-by-Extrinsic-Fact*, 47 CORNELL L.Q. 14 (1961); Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966). *But see* Eldredge, *Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966). For a discussion of this problem in North Carolina see Note, 33 N.C.L. REV. 674 (1955). The most recent statement of the North Carolina position is found in Robinson v. Nationwide Ins. Co., 273 N.C. 391, 159 S.E.2d 896 (1968).

[14] Dean Prosser's proposed revisal of the *Restatement of Torts* would read as follows:

§ 569. Liability Without Proof of Special Harm.

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is

(a) Libel whose defamatory meaning is apparent from the publication itself without reference to extrinsic facts, or

(b) Libel or slander which imputes to another

(i) A criminal offense, . . .

(ii) A loathesome disease, . . .

(iii) Matter incompatible with his business, trade, profession or office, . . .

(iv) Unchastity on the part of a women, ...

The extrinsic-fact test, which determines if the plaintiff must plead and prove special damages, evolved solely in the law of libel. The two categories of libel were labelled per se and per quod.[15] Libel per se required no special damages; libel per quod did. But the double meaning of these two terms created a situation ripe with possibilities for confusion by the courts.

The categories of words held to be slander per se have long been recognized in North Carolina.[16] The court in *Beane* quoted with approval from *Penner v. Elliott*,[17] an earlier North Carolina slander case in which the North Carolina Supreme Court said that "[w]e must look to the common law, under the guidance of our own decided cases . . ."[18] and the words held to be slander per se included "[a]ccusations of crime or offenses involving moral turpitude, defamatory statements about a person with respect to his trade, occupation or business, imputations of having a loathesome disease, and the like."[19]

The confusion arises in the law of slander in North Carolina when the plaintiff must resort to extrinsic facts to show the defamatory meaning of the utterance. There is authority for the proposition that North Carolina adheres to the common law rule allowing the plaintiff to resort to extrinsic evidence to bring the utterance into one of the slander per se categories without his having to show special damages. The common law rule was stated in an early case, *Watts v. Greenlee*,[20] in which the court, considering a charge of incontinency,"[21] said that "[w]ords not in themselves actionable may be rendered so . . . by something extrinsic, with the aid of *innuendo*."[22]

In certain cases the plaintiff may be forced to rely on extrinsic facts such as an unusual meaning of the utterance or facts known to the hearer to prove defamation. If the defamatory meaning thus alleged is subject

(2) One who publishes any other libel or slander is subject to liability only upon proof of special harm . . . .

Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 850 (1960).

[15] *E.g.*, Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938); *see* Henn, *supra* note 8, at 22.

[16] *E.g.*, Broadway v. Cope, 208 N.C. 85, 179 S.E. 452 (1935) (injury to trade); Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933) (crime involving moral turpitude); McKee v. Wilson, 87 N.C. 300 (1882) (crime and use of office).

[17] 225 N.C. 33, 33 S.E.2d 124 (1945).

[18] *Id.* at 34, 33 S.E.2d at 125.

[19] *Id.*

[20] 13 N.C. 115 (1829).

[21] *Id.* at 118-19.

[22] *Id.* at 117.

to permissible inference, the case is for the jury. For example, the plaintiff resorted to extrinsic facts in *Oates v. Wachovia Bank & Trust Co.*,[23] a case involving an accusation of crime. The court allowed the introduction of the "circumstances of the publication" and "the hearer's knowledge of facts which would influence their understanding of the words used"[24] without requiring an allegation of special damages.

Scott v. Harrison[25] contains another exposition of the majority position with respect to extrinsic evidence in the law of slander. The plaintiff, a high school principal's wife, alleged that defendant had said that the plaintiff had been forbidden to go on the premises of a school at which her husband had been principal.[26] Justice Seawell in a well-reasoned opinion criticized the arbitrary categories of slander, but reaffirmed the position of the categories in North Carolina law.[27] In approaching the problem of extrinsic evidence, he said that "[i]n the complaint under consideration none of the charges of slander is laid with an 'innuendo' attaching any special meaning to the words used other than that which is obvious, and under the ordinary meaning they are not actionable per se."[28] Clearly, "innuendo" would have been allowed to bring the words within the common law slander categories.

A hint of confusion and deviation from the common law is contained in the early case *Pegram v. Stoltz*.[29] In an action for slander, the plaintiff alleged that the defendant called him "a perjured man" for falsely swearing as to his residence before a board of registrars.[30] The court first concluded that the crime alleged was not infamous; thus the accusation was not within that category of slander.[31] The court, discussing the introduction of extrinsic evidence, stated that

> [W]hen the words spoken are such as do not on their face import such degradation as will of course be injurious . . . then the plaintiff must aver some special damage, which is called laying his action with a *per quod*, and must show by proof that he has in point of fact sustained a loss before he can recover.[32]

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[23] 205 N.C. 14, 169 S.E. 869 (1933).
[24] *Id.* at 17, 169 S.E. at 871.
[25] 215 N.C. 427, 2 S.E.2d 1 (1939).
[26] *Id.* at 428-29, 2 S.E.2d at 1-2.
[27] *Id.* at 430, 2 S.E.2d at 2.
[28] *Id.* at 430, 2 S.E.2d at 2.
[29] 76 N.C. 349 (1877).
[30] *Id.* at 349-50.
[31] *Id.* at 352.
[32] *Id.* at 351.

This statement can be regarded as surplusage in the decision of the case since extrinsic circumstances could not have brought the accusation within any of the slander per se categories. The implication is present, however, that extrinsic circumstances would not have been allowed to prove the words actionable per se.

The North Carolina Supreme Court continued its deviation from the common law in *Deese v. Collins*,[33] in which the allegation was that the defendant had charged the plaintiff, a white man, with having Negro blood.[34] The court relied on the common law slander categories to hold that the allegation was not slander per se.[35] The court also implied that extrinsic evidence would not have been allowed to bring the utterance within the slander categories by quoting with approval[36] from *Pegram*, but again this part of the opinion can be considered dictum since extrinsic evidence would not have aided the plaintiff. In *Badame v. Lampke*,[37] cited by the court of appeals in *Beane*, the Supreme Court of North Carolina confirmed its confusion of the common law of defamation. The words complained of in this case were directed toward a businessman and clearly fell within one common law category of slander per se.[38] Relying on *Deese v. Collins*,[39] the court expressly imported the extrinsic-fact test, a libel distinction, into the law of slander by stating

> [I]f the injurious character of the spoken statement appears, not on its face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing its injurious effect, such utterance is said to be actionable only *per quod*, and in such cases, the injurious character of the words must be pleaded and proved, and in order to recover there must be allegation and proof of some special damage.[40]

The court concluded in this case that the defamation was apparent on its face.[41]

In *Beane* the court relied both on *Penner v. Elliott*,[42] which is authority for application of the traditional common law slander test, and on *Badame*

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[33] 191 N.C. 749, 133 S.E. 92 (1926).
[34] *Id.* at 749, 133 S.E. at 92.
[35] *Id.* at 751, 133 S.E. at 92-93.
[36] *Id.* at 750, 133 S.E. at 92.
[37] 242 N.C. 755, 89 S.E.2d 466 (1955).
[38] *Id.* at 757, 89 S.E.2d at 468.
[39] 191 N.C. 749, 133 S.E. 92 (1926).
[40] 242 N.C. at 757, 89 S.E.2d at 467-68.
[41] *Id.* at 757, 89 S.E.2d at 468.
[42] 225 N.C. 33, 33 S.E.2d 124 (1945).

v. Lampke,[43] which requires use of the extrinsic-fact test. The court could have decided that the words did not fall within the category of injury to trade and employment and thus might have relied solely on the traditional slander test of *Penner* in its resolution of the case on the facts before it. It is impossible to determine if the court actually intended to give effect to the extrinsic-fact test in concluding that the words were actionable per quod. The vagueness surrounding the court's holding serves only to amplify the confusion that exists in the law of defamation in North Carolina.

The apparent application in *Beane* of both the traditional slander test and the extrinsic-fact test has definite implications for plaintiffs in future slander cases. If both tests are to be applied in North Carolina to determine what will be slander per se, future plaintiffs will have to allege and be able to prove special damages in all cases in which the utterance does not on its face fall within the four slander categories. These requirements present a formidable hurdle for plaintiffs in cases in which proof of special damages is difficult.

The most plausible explanation for use of the extrinsic-fact test in libel is that a limited number of people will understand the defamatory nature of the writing if it is not apparent on the face. This same consideration should apply to the law of slander, and thus the North Carolina courts are serving a useful function in the area of defamation if they are attempting to require special damages to make actionable oral statements that on their face do not fall within one of the four traditional categories.[44] The possibility of abuse has always existed in cases in which the words were held to be slander per se since the jury had discretion to award damages without evidence of the plaintiff's actual loss. As a measure to prevent petty suits and as an aid in first amendment protection, the application of the extrinsic-fact test to supplement the traditional category test will be valuable in the law of slander.

The confusion of the North Carolina courts over the extrinsic-fact test arises not so much from the importation of this test from the law of libel into that of slander as it does from the inconsistent application of

[43] 242 N.C. 755, 89 S.E.2d 466 (1955).

[44] The application of the extrinsic-fact test in North Carolina slander cases has been more restrictive than the application of the same test in libel actions in a majority of American jurisdictions. In libel, the majority allow the introduction of extrinsic facts to bring the writing within the traditional slander categories without requiring proof of special damages. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 850 (1960).

the test in slander cases. In addition, there appears to be confusion over whether the extrinsic-fact test was a determining factor in those cases in which it was stated as the applicable law. These areas of confusion should be clarified in the next appropriate case to insure that plaintiffs are able to foresee recovery with some reasonable degree of certainty and to make clear whether the extrinsic-fact test will always be applied when oral statements are not actionable on their face.

LANNY B. BRIDGERS

Torts—Liability of Physicians for Violation of Certification Requirements in Commitment Process

The right of a mentally ill woman not to be restrained against her will was the concern of the court in *Di Giovanni v. Pessel.*[1] In affirming an award of punitive damages against a physician whose false affidavit was a substantial factor in the commitment of the plaintiff to a mental hospital, the court aptly reflected intolerance toward the wilful and injurious dereliction of a statutorily imposed duty. Unfortunately, convoluted reasoning obscured the expression of this judicial intolerance.

The civil rights of the mentally ill have received close scrutiny in recent years,[2] and legislation has reflected concern for those rights.[3] Generally, statutes authorizing involuntary commitment require a judicial hearing before commitment can be effected; commonly, these statutes require medical certification as to the insanity of the individual involved before commitment can be ordered. In case of an emergency whereby the individual must be restrained immediately and there is insufficient time for

[1] 104 N.J. Super. 550, 250 A.2d 756 (Super. Ct., App. Div. 1969).

[2] *See, e.g.*, R. FARMER, THE RIGHTS OF THE MENTALLY ILL (1967); F. LINDMAN & D. MCINTYRE, JR., THE MENTALLY DISABLED AND THE LAW (1961) [hereinafter cited as LINDMAN & MCINTYRE]; NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (Public Health Service Pub. No. 51, 1952); R. ROCK, M. JACOBSEN, & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL (1968) [hereinafter cited as ROCK]; *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. I (1961); Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274 (1953); Comment, *The New Mental Health Codes: Safeguards in Compulsory Commitment and Release*, 61 NW. U.L. REV. 977 (1967).

[3] *See, e.g.*, D.C. CODE ANN. §§ 21-501 to -591 (1967). In its report to the Senate when the bill was under consideration, the Senate Judiciary Committee expressed the hope that the act would serve as a model for revision of state hospitalization laws. SENATE COMM. ON THE JUDICIARY, PROTECTING THE CONSTITUTIONAL RIGHTS OF THE MENTALLY ILL, S. REP. No. 925, 88th Cong., 2d Sess. 10 (1964).